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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY RAY McFARLAND,

Defendant and Appellant.

H034258

(Santa Clara County

Super. Ct. No. BB619412)

Defendant Anthony Ray McFarland appeals an order of the trial court finding him incompetent to stand trial, asserting the evidence was insufficient to support the trial court's finding, and that the trial court erred in not appointing a second defense attorney to represent defendant in the competence proceedings.

**STATEMENT OF THE CASE<sup>1</sup>**

In April 2008, defendant was charged with threatening to commit a crime resulting in death or great bodily injury (Pen. Code, § 422).<sup>2</sup> The information also alleged defendant had one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12), one prior

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<sup>1</sup> The underlying facts of this case are not included in this opinion, because they are not relevant to the issues presented on appeal.

<sup>2</sup> All further unspecified statutory references are to the Penal Code.

serious felony conviction (§ 667, subd. (a)), and three prior prison commitments (§ 667.5, subd. (b)).

On June 30, 2008, the court suspended criminal proceedings and appointed mental health professionals to evaluate defendant and determine if he was competent to stand trial pursuant to section 1368.

In December 2008, a hearing was held pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 that the court denied.

In March 2009, Dr. David Berke submitted a report to the court regarding his evaluation of defendant's competence to stand trial. Defendant refused to meet with Dr. Berke, and after reviewing defendant's substantial psychiatric and jail records, Dr. Berke offered a tentative opinion that defendant was incompetent to stand trial.

In April 2009, Dr. Andrea Shelley examined defendant personally, and reviewed his psychiatric and jail records. Dr. Shelley reported unequivocally to the court that in her opinion, defendant was not competent to stand trial.

In May 2009, the trial court found defendant incompetent to stand trial. The court issued an order of commitment to the Department of Mental Health for a maximum period of three years, with 950 days of credit for time already in custody.

Defendant filed a timely notice of appeal of the commitment order, which is appealable under Code of Civil Procedure section 904.1, subdivision (a)(1). (*People v. Fields* (1965) 62 Cal.2d 538, 541.)

## **DISCUSSION**

Defendant asserts there is not substantial evidence to support the trial court's finding that he is incompetent to stand trial. In addition, defendant argues the trial court should have appointed separate counsel to represent him in the competency proceeding.

### ***Substantial Evidence To Support the Finding of Incompetence***

Under section 1367, subdivision (a), a defendant is incompetent to stand trial "if, as a result of mental disorder or developmental disability, the defendant is unable to

understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.” Further, section 1369, subdivision (a), which addresses the procedure to determine if a defendant is incompetent to stand trial provides, in pertinent part, “[t]he court shall appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. In any case where the defendant or the defendant’s counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists, licensed psychologists, or a combination thereof.” (Italics added.)

“As a matter of due process, the trial court is required to conduct a section 1368 hearing to determine a defendant’s competency whenever substantial evidence of incompetence has been introduced. [Citations.] Substantial evidence is evidence that raises a reasonable doubt about the defendant’s competence to stand trial. [Citations.]” (*People v. Frye* (1998) 18 Cal.4th 894, 951-952.) Of course, “[a] defendant is presumed to be mentally competent unless at the . . . section 1368 hearing it is proved by a preponderance of the evidence that he is mentally incompetent. (Pen. Code, § 1369, subd. (f); *People v. Superior Court (Campbell)* (1975) 51 Cal.App.3d 459, 464 . . . .)” (*People v. Campbell* (1976) 63 Cal.App.3d 599, 608.) According to the court in *People v. Campbell, supra*, in determining mental competence within the meaning of section 1368, the following standard is to be applied: “[I]s the defendant capable of understanding the nature and purpose of the proceedings taken against him; does he comprehend his own status and condition in reference to such proceedings; is he capable to assist his attorney in conducting his defense, . . . in a rational manner?” (*People v. Campbell, supra*, 63 Cal.App.3d at p. 608.)

“On appeal, the finding of the trier of fact upon the issue of competenc[e] to stand trial cannot be disturbed if there is any substantial and credible evidence in the record to support the finding. (See *People v. Belcher* (1969) 269 Cal.App.2d 215, 220 . . . .)” (*People v. Campbell, supra*, 63 Cal.App.3d at p. 608.)

Here, Dr. David Berke was retained by defendant's counsel to evaluate defendant's competence. Dr. Berke reviewed the psychiatric records from Atascadero State Hospital, the police reports, the jail medical records, a report from a previously appointed psychologist, Dr. David Echeandia, and defendant's own writings. Berke did not personally meet with defendant, because defendant refused the two attempts to evaluate him. Based on his review of the records, Berke offered a self-described "tentative opinion," in which he believed defendant was not competent to stand trial. Berke stated his opinion as follows: "The Atascadero State Hospital psychiatric records substantiate that he has been severely mentally ill for yours [*sic*]. He has a diagnosis of paranoid schizophrenia, chronic, paranoid type. It is documented that he had exhibited symptoms of severe mental illness, including being paranoid, suspicious, grandiose, hostile, guarded; lacking insight into his mental health problems; and being delusional to the point of believing that his conversations with others are being recorded."

In addition to Dr. Berke, court-appointed psychologist Andrea Shelley evaluated defendant, and submitted a report. Dr. Shelley also reviewed defendant's extensive medical and jail records. Dr. Shelley was able to personally interview defendant in the jail, although the interview had to be conducted with defendant in his cell, because he was deemed too combative to be removed. Based upon her review of the records, as well as her personal meeting with defendant, Dr. Shelley formed the opinion that defendant was not competent to stand trial. In her report, Dr. Shelley stated: "It is my opinion that [defendant] is presently incompetent to stand trial. Currently [defendant] is psychotic and paranoid. He is not able to care for his daily needs and is uncooperative, isolative, and combative due to his paranoia. At this time he is not capable of carrying on a discussion of any importance or details due to his mental illness."

Defendant asserts a lack of substantial evidence to support the incompetence finding based on the argument that none of the doctors who evaluated defendant offered a "confident opinion" that defendant was incompetent. In support of this argument,

defendant relies on *People v. Rodrigues* (1994) 8 Cal.4th 1060 (*Rodrigues*). In *Rodrigues*, the defendant argued the trial court erred in not ordering a competence evaluation sua sponte in light of substantial evidence of his mental incapacity. The *Rodrigues* court found that two doctors' evaluations of the defendant did not provide substantial evidence of incompetence to necessitate a hearing. Specifically, the court found the first doctor's opinion was vague and lacking important specifics, having been gleaned from a negligible amount of transcript, with no personal meeting between the doctor and the defendant. The second doctor, who did personally meet with the defendant, had an opinion that was inconclusive, stating he was " 'not sure about his opinion since he's not done a competency evaluation and wanted to get a psychological evaluation on competence before he arrived at an opinion.' " (*Id.* at p. 1111.) Based on the tentative nature of both doctors' opinions, the court in *Rodrigues* found there was not substantial evidence to support a sua sponte duty to conduct a competence hearing.

Here, defendant argues by analogy to *Rodrigues* that both Dr. Berke and Dr. Shelley's opinions of his mental state were similarly tentative, and do not provide substantial evidence of his incompetence. While Dr. Berke did not personally meet with defendant prior to his evaluation, he did form an opinion of defendant's mental state based on a review of substantial records and defendant's conduct during the pendency of this case. In addition, Dr. Shelley reviewed defendant's records, and met with him personally, stating unequivocally that she believed defendant was incompetent to stand trial due to his pervasive paranoid beliefs. Neither Dr. Berke's nor Dr. Shelley's opinions were similar the doctors' opinions in *Rodrigues*. On the contrary, both doctors clearly opined that defendant was incompetent based on their review of the case.

Viewing the record in the light most favorable to the People, as the party who prevailed below, and presuming in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence (see *People v. Campbell*,

*supra*, 63 Cal.App.3d at p. 608), defendant's competency to stand trial was clearly established by the testimony here.

***Appointment of a Second Defense Attorney for the Competence Hearings***

Defendant argues that because he disagreed with his attorney, and personally believed that he was competent to stand trial, the court should have appointed a second attorney to assist him in opposing the finding of incompetence.

This court rejected the same argument in *People v. Jernigan* (2003) 110 Cal.App.4th 131. In *Jernigan*, this court stated: "[t]he fact that counsel and her client differed on the central issue of defendant's competency does not raise an actual conflict requiring the appointment of a second attorney. Once the judge has declared a doubt sufficient to require a section 1368 hearing, defendant's attorney necessarily plays a much greater role in making fundamental choices for her client. (*People v. Samuel* (1981) 29 Cal.3d 489, 495 . . . .) It is immaterial that the defendant expressly objects to the course his counsel chooses. To permit a prima facie incompetent defendant to veto counsel's decision to argue that the client is incompetent would increase the danger that the defendant would be subjected to criminal proceedings when he or she is unable to assist counsel in a rational manner. (See *Shephard v. Superior Court* (1986) 180 Cal.App.3d 23, 30 . . . .) Therefore, '[w]hether or not the client objects, counsel must be allowed to do what counsel believes is best in determining the client's competence.' (*People v. Masterson* (1994) 8 Cal.4th 965, 973 . . . .)" (*Id.* at pp. 134-136.)

In the present case, the fact that defendant disagreed with his attorney regarding competence does not bear on his counsel's ability to represent him, or to advocate for his best interest. Indeed, the sole purpose of a competency proceeding is to protect the accused. (*People v. Bye* (1981) 116 Cal.App.3d 569, 576.) Here, counsel declared a doubt as to defendant's competence presumably based on his judgment that it was in defendant's best interest to do so. Defendant did not need a second attorney to protect his best interest by advocating defendant's personal belief that he was competent to stand

trial. Thus, the trial court did not err in refusing to appoint a second attorney to represent defendant in the competence proceedings.

**DISPOSITION**

The order is affirmed.

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RUSHING, P.J.

WE CONCUR:

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ELIA, J.

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DUFFY, J.